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In the Supreme Court of the United States

No. 684.

OCTOBER TERM, 1944.

COPPERWELD STEEL COMPANY,

Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

ROBERT G. DAY,
HENRY H. HOPPE,
Second National Building,
Warren, Ohio,
Attorneys for Appellant.

FRANK R. S. KAPLAN,
E. P. McHUGH, JR.,
HOPPE, DAY & FORD,
Of Counsel.

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I.

A Federal question is properly before this Court where it was raised and passed upon in the highest State Court and was necessary to the determination of the cause in that Court.

The petition in the Supreme Court of Ohio prayed in substance (See opinion, 142 O. S. 439, 441) that the orders of the Industrial Commission be set aside; that the claims be disallowed; that a writ issue, prohibiting and enjoining the defendant from continuing the orders in effect, from making any payments thereunder, and from taking into consideration any payments which may have been made thereunder in the rating of the plaintiff's Workmen's Compensation risk, and requiring the defendant to vacate such orders and disallow the claims; and for other relief; alleging that otherwise the orders of the Commission would deprive the plaintiff of its property without due process of law and would deny it the equal protection of the laws. From this, it necessarily follows that the judgment of the court denying any remedy to appellant deprives it of property without

due process and denies it the equal protection of the laws; and it was so alleged in the amendment to the petition. The judgment of the State court was based on its construction and application of the Workmen's Compensation Act, which was accordingly drawn in question and held not repugnant to the Fourteenth Amendment.

Appellee could not have intended literally the statement that the question of constitutionality was not properly raised in the Supreme Court of Ohio; but only that the unconstitutionality of the Workmen's Compensation Act was not expressly alleged before the Act was so construed and applied as to deny due process and equal protection of the law.

Any one of the grounds claimed—the unconstitutionality of the orders of the Commission, of the judgment of the State court, or of the Workmen's Compensation Act—gives this Court jurisdiction to hear this cause upon certiorari; and this Court will consider the petition for appeal as a petition for certiorari, under 28 U. S. C. § 344(c), if it should be considered that the appeal itself was improvidently taken.

But we submit that the appeal was properly taken and allowed on the last of these grounds—the unconstitutionality of the Workmen's Compensation Act. Under 28 U. S. C. § 344(a) it is not required that the validity of the statute be drawn in question expressly, in any particular pleading or manner, or by the appellant. Indeed, if the adjudication of a Federal question is necessarily involved in the disposition of the case by a state court, it is not necessary that it appear in the record or in the opinion that such a question was raised and decided. *Cissna v. Tennessee*, 246 U. S. 289, 293; *Kaukauna Company v. Green Bay and M. Canal Company*, 142 U. S. 254, 269.

Where the validity of a state statute is drawn in question, and the decision is in favor of its validity, this Court has repeatedly held that if the Federal question appears

in the record and was decided, or that such a decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here—*Water Power Company v. Street Railway Company*, 172 U. S. 475, 488, and cases cited therein.

Where the highest state court considered a question as fairly before it for determination, and decided it, the question has been properly raised—*St. L. I. M. & S. Ry. v. Hesterly*, 228 U. S. 702, 704; *Miedreich v. Lauenstein*, 232 U. S. 236, 243; *Mallinckrodt Works v. St. Louis*, 238 U. S. 41, 49; *Whitfield v. State*, 297 U. S. 431, 436.

It is sufficient that the question was considered in the opinion and ruled against appellant—*Land & Water Company v. San José Ranch Co.*, 189 U. S. 177, 179; *Philadelphia Fire Association v. New York*, 119 U. S. 110, 115; *Haire v. Rice*, 204 U. S. 291, 299.

It is sufficient to the jurisdiction of this Court that the Supreme Court of Ohio could not have denied appellant a hearing upon questions of law and review of, prohibition against, or mandamus to compel a reversal of, the orders of the Commission without holding valid and not repugnant to the Fourteenth Amendment the Workmen's Compensation Act as construed and applied by it, whereby—

(a) orders of the Commission awarding compensation payable from the state insurance fund are accorded finality (G. C. § 1465-90); and

(b) a self-insuring employer or an employer violating the act by failure of compliance may defend against collection of an adverse award of compensation upon any legal ground (G. C. § 1465-74). On the other hand, the court held that the contributing employer is neither a necessary nor proper party to proceedings for allowance of a claim under G. C. § 1465-90; that it has no direct financial interest in the distribution of the fund (Opinions, 142 O. S. 439, 444; 143 O. S. 591, 595);

and, therefore, that the contributing employer has no remedy against orders illegally awarding compensation for injuries and deaths not arising in the course or out of the employment, or which are invalid on any other legal ground.

The court specifically held that appellant was not denied due process of law or equal protection of the law by its decision, although under the statute the Industrial Commission includes as factors in the classification of risks and fixing of premium rates, the amount of all awards of compensation to employes within the industry and to employes of the particular employer, during the current five-year period; and by reason of the denial of a hearing upon questions of law and remedy against the unlawful awards, appellant, as a contributing employer, has been and will be deprived of property without due process of law, over the five-year period, amounting to over $20,000 in the year 1943 alone.

The unconstitutionality of the orders and judgment, and of the Workmen's Compensation Act, under which the majority of the court attempted to justify them, is demonstrated in the dissenting opinion (143 O. S. 596).

(A) The citations of appellee in I (A) of its Statement are not in point.

(B) *State ex rel. Williams v. Industrial Commission*, 116 O. S. 45, involved only an insignificant discrimination against employers contributing to the state insurance fund by an order for the payment from the surplus fund of compensation awarded to an employee of an insolvent, non-complying employer, and no contributing employer was there complaining (p. 55). Nevertheless, a majority of the court dissented (p. 48) on the ground that the provision involved (G. C. § 1465-75 as then in force) was unconstitutional.

Admittedly, in the case at bar, we do not question the validity of G. C. § 1465-54, sub 3, authorizing the Industrial

Commission to adopt and apply a form of merit rating system, nor do we question the actuarial formulae adopted by the Commission for rating industrial risks, or its classifications of risks, as was the case in *State ex rel. Powhatan Mining Company v. Industrial Commission,* 125 O. S. 272, where the court held the classification of risks and adoption of formulae for determination of premiums not unconstitutional "merely because it was not made with mathematical nicety or because in practice it results in some inequality." We concede the reasonable basis for the actuarial formulae adopted and applied and for the Commission's classifications of risks, but it was never intended that computations under such formulae should include any awards beyond the jurisdiction of the Commission such as awards for injuries and deaths which did not arise in the course of or out of the employment. Neither G. C. § 1465-54 nor the formulae or classifications adopted by the Commission thereunder are unconstitutional except as a part of the entire statute so construed as to deny any remedy or means of exclusion of unlawful awards, and particularly when compared with the right of self-insuring and non-complying employers to avoid awards which are unlawful for any reason.

II.

The case at bar does not relate merely to procedure and remedy (except as the denial of any remedy whatever is unconstitutional) and thereby differs from the cases cited by appellee, in none of which was there any substantial denial of remedy.

(A) *Industrial Commission v. Monroe,* 111 O. S. 812, 813, involved a section of the Act extending workmen's compensation to cases of occupational disease, but providing that G. C. § 1465-90 shall not apply thereto. However, if, upon the undisputed facts, the claimant had contracted

and suffered disability from an occupational disease, under all the conditions required by the statute, and the Commission should arbitrarily deny the claim, we submit that the Commission could be required by mandamus to allow and pay the claim. Likewise, if under the undisputed facts the employe clearly had no occupational disease within the definition of the Act, or, having such a disease, had contracted it elsewhere than in his employment, or during a period prior to that specified in the Act as essential to compensation, and if the Commission should nevertheless exceed its jurisdiction and award compensation, we submit that the courts would have jurisdiction to prohibit payment of such a claim.

III.

The cases cited under this subdivision do not concern matters of procedure. *State of Ohio ex rel. Lourin v. Industrial Commission,* 138 O. S. 618, involved a section of the Compensation Act in effect at the time the claim arose, providing a schedule of compensation for silicosis different from that for injuries and other occupational diseases.

Jeffrey Mfg. Co. v. Blagg, 235 U. S., 571, concerned the validity of a provision of the then optional Workmen's Compensation Act of Ohio abolishing the common law defenses of those employers of five or more workmen failing to comply with the Act.

Middleton v. Texas Power & Light Co., 249 U. S. 152, concerned the constitutionality of a provision excepting certain classes of employers and employes from application of the Workmen's Compensation Act of Texas.

We submit that the constitutionality of the orders of the Commission, the judgment of the court below, and the Workmen's Compensation Act, as construed and applied by that court, were called in question and necessarily decided adversely to the claims of appellant, and that full

opportunity should be allowed for presentation of this cause to this Court.

Robert G. Day,
Henry H. Hoppe,
Attorneys for Appellant.

Frank R. S. Kaplan,
E. P. McHugh, Jr.,
Hoppe, Day & Ford,
Of Counsel.